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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1963

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
Petitioner,

vs.

CORPORATION AND SECURITIES COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN[1]

Respondent opposes the petition for writ of certiorari from the judgment entered by the Supreme Court of Michigan on September 4, 1963, in the case of *Wisconsin & Michigan Steamship Company*, Petitioner-Appellant, v. *Corporation and Securities Commission*, Respondent-Appellee, 371 Mich 61, which judgment affirmed the opinion and order of the Michigan Corporation Tax Appeal Board of January 25, 1962, on the following grounds:

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[1] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the Petition for Writ of Certiorari to the Supreme Court of the State of Michigan; and numbers in parentheses followed by "a" refer to pages of Appendix for Appellant filed in the Michigan Supreme Court.

1. The only federal question sought to be raised by the petition has been conclusively adjudicated by this Court contrary to petitioner's position.

2. The petitioner has not properly raised any federal question.

3. The judgment of the Supreme Court of Michigan is conclusive.

OPINIONS BELOW

The opinions of the Court below and of the Michigan Corporation Tax Appeal Board, and references thereto, are correctly set forth by petitioner (2, 30-41).

JURISDICTION

The petitioner attempts to invoke jurisdiction of this Court under 28 U.S.C. § 1257 (3). For the reasons set forth herein, the petition should be denied.

STATUTES INVOLVED

The statute involved is correctly set forth by petitioner in Appendix "C" to its petition (43-45) and is properly referred to by petitioner (3-4), except that Section 5e of Act No. 85 of the Michigan Public Acts of 1921, as amended,[21] is applicable in adjusting the apportionment formula provided in other sections of said act only.

"If it shall appear on the application of the taxpayer

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[21] CLS § 450.305e; MSA § 21.208(5).

or otherwise that an allocation factor determined pursuant to this act does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state * * *" (45)

Respondent disagrees with petitioner's statement that it did not compl with the state statutory provisions, which question is purely one of state law, posing no federal question. Furthermore, Section 5e has no application in this cause for the reason that petitioner did not attempt to bring its apportionment problem within the scope of the Section 5e provision.

The statute was construed as follows by the Court below:

"Michigan's annual franchise fees are imposed alike upon domestic corporations and foreign corporations admitted to do business within the State. Corporations, both domestic and foreign, not maintaining a regular place of business outside this State, other than a statutory office, paid, during the period here in controversy, an annual privilege fee of 4 mills upon each dollar of their entire paid-up capital and surplus. Except for certain classes of carriers, of which appellant is one, other corporations are required to pay annual franchise fees measured by that proportion of their paid-up capital and surplus attributable to Michigan in accordance with an apportionment formula known as the Massachusetts formula. The annual franchise fees of motor carriers of property and all carriers by water, such as appellant, whether domestic corporations or foreign corporations admitted to do business in Michigan, are measured by the apportionment formula set forth in the margin. This formula provides for the allocation of a portion of the carrier's

paid-up capital and surplus to Michigan, and thereby subject to Michigan's 4 mill franchise fee rate, in proportion to the ratio which the carrier's total tonnages of revenue passengers and cargo received or discharged within Michigan bears to its total tonnages received and discharged everywhere. (31-32).

* * *

"Michigan's corporate franchise fee is not an *ad valorem* tax on property, nor is it an income tax, a gross receipts tax nor a sales tax. Keeping in mind what Michigan's franchise fee is not, it may be conceded that the State may not otherwise impose a charge upon appellant for the privilege of doing an interstate business in Michigan. * * * (33-34)

* * *

"The fee charged is for the privilege granted, as the legislature itself has stated, 'irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period.' CLS 1956, § 450.304 (Stat. Ann. 1959 Cum. Supp. § 21.205). See *Holland Hitch Company* v. *State of Michigan*, 318 Mich. 474, 479.

"It is not the privilege to do interstate business in Michigan for which appellant applied to the State and for the grant of which the State seeks to charge it an annual fee. Its right to engage in such interstate business in Michigan is not subject to the State's grant or denial. Appellant sought, and was granted, the privilege to do *intrastate* business in Michigan. * * *" (34-35)

QUESTIONS PRESENTED

Petitioner's petition for writ of certiorari does not properly state any federal question. Respondent believes the only possible federal question to be:

> Can the State of Michigan measure a corporate privilege tax imposed on foreign corporations for the privilege of doing or being able to do business in this State by reference to the total business done within this State, irrespective of whether it is characterized as "interstate", "intrastate", or "foreign" in nature, or must it measure its local privilege fee solely by reference to intrastate activities of the foreign corporation within the State?

As stated in the language of the Supreme Court of Michigan in its opinion:

> "The only meritorious issue before us is whether Michigan may determine the amount of such privilege fee by reference to appellant's total business transacted in Michigan which, for our purposes we may assume, as appellant claims, was solely interstate in character, or whether it may be charged a franchise fee in excess of the $10 minimum fee provided by the statute only when it actually conducts intrastate business in Michigan and then by reference only to such intrastate business." (36)

The above issue, as quoted by the lower Court, was stated by petitioner thusly for the Court below:

> "* * * does the inclusion of cargoes loaded and unloaded in Michigan ports and transported solely and exclusively in interstate commerce violate the Com-

merce Clause (Article I, Section 8) of the Constitution of the United States?" (41)

In reference to this issue, the lower Court correctly stated petitioner's claim to be (32-33)

> "* * * that inasmuch as it engaged solely in interstate commerce in Michigan, the annual franchise fee claimed from it by the State, determined in accordance with the statutory formula which takes into account appellant's interstate tonnages, constituted a direct burden by the State on interstate commerce in contravention of the commerce clause of the Federal Constitution, Art. 1, § 8. Relying upon *Gurtland Steamship Company* v. *Corporation & Securities Commission*, 339 Mich. 661, and *Panhandle Eastern Pipe Line Company* v. *Corporation & Securities Commission*, 346 Mich. 50, appellant argues that none of its interstate passenger and cargo tonnages should have been considered in computing the apportionment factor to be applied to its paid-up capital and surplus for determining what portion thereof was subject to the 4 mill franchise fee rate. Since appellant's entire business in Michigan, according to its view, was in interstate commerce, it contends that none of its tonnage properly could be taken into account and that the apportionment factor under such circumstances should have been zero. That result, of course, would have relieved appellant of all liability under the statutory formula (although appellant concedes liability for the annual $10 minimum fee required by CLS 1956, § 450.304, [Stat Ann 1959 Cum Supp § 21.205].[5] * * *

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5. "Implicit in appellant's concession of liability for the annual $10 minimum franchise fee is its recognition that the State properly may charge some fee, at least

when the franchise granted was voluntarily sought, whether or not it was actually exercised."

STATEMENT OF THE CASE

Respondent cannot accept petitioner's statement of the case as relevant to the federal question sought to be raised. Facts pertaining to this question are set forth in the opinion of the Court below, as follows (30-31):

> "Appellant steamship company is a Wisconsin corporation carrying passengers, automobiles and other freight across Lake Michigan between the ports of Milwaukee, Wisconsin and Muskegon, Michigan. In 1941, *upon its own application*, it was admitted to do intrastate business within Michigan. From 1952 through 1959, it filed the annual reports required by law to be filed with the corporation and securities commission by every domestic and foreign profit corporation granted the privilege of doing such business within this State. Section 4 of PA 1921, No. 85, as amended (CLS 1956, § 450.304 [Stat Ann 1959 Cum Supp § 21.205]). This appeal from the corporation tax appeal board concerns the amount due the State during those years (except 1955) as appellant's annual franchise fee payable at the time of filing its annual reports.
>
> "Appellant does not claim that the State seeks to impose a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan. Nor does the State claim in this case that it could do so lawfully. Instead, appellant *voluntarily* applied for admission to do business locally within this State and was granted that privilege. While appellant concedes the State may charge it the statutory minimum

> fee of $10 annually for the local privilege granted notwithstanding its professed failure to date to exercise the granted privilege, it denies the State's right to charge it a privilege fee based upon any formula which takes into account any of the appellant's interstate business. Appellant and the State spend considerable effort in arguing whether appellant's activities in Michigan constitute exercise of its local privilege. Were this a case in which the State sought to compel appellant to qualify for admission and to pay a privilege fee therefor on the ground that its activities in Michigan constituted local business, we would be required to resolve the parties' argument. However, this is not such a case. Appellant does not deny that it is liable for some fee for its voluntarily acquired privilege, whether exercised or not. The only question is its amount and the answer to that question *does not* depend upon whether or to what extend appellant engages in what may be called purely local business."

Because of petitioner's voluntary action in qualifying to conduct an intrastate business in Michigan, and since the amount of a local fee is not dependent upon the amount of intrastate business as contrasted to interstate business conducted within the State, the Court below found

> "* * * it is not necessary to review the corporation tax appeal board's finding that appellant was engaged in such intrastate business during the periods involved in this appeal." (41)

However, the Corporation Tax Appeal Board [whose findings of fact are controlling if supported by competent evidence: *Udility Corp.* v. *Corp. & Sec. Comm.*, 319 Mich 1; *Duluth, South Shore & Atlantic RR Co.* v. *Corp. & Sec. Comm.*, 353 Mich 636] specifically found that

> "The appellant conducts sales and renders services upon its boats within the territorial waters of Michigan, in Muskegon Lake and at the dock; it maintains and keeps in repair a sign in Muskegon directing passengers to the dock, and gathers passengers and freight throughout the state by the employment of 'independent agents.' Publicity is given the appellant's transportation services and vessels by its agents and the listing of appellant in telephone directories in the larger cities of the state. For the calendar years 1953 through 1957, which constitute the periods covered by appellant's Annual Reports of 1954 through 1958, appellant itself maintained a passenger ticket office during the travel season which was staffed by two of its employees." (90a)

Notwithstanding its reliance on Section 5e of Act 85 of the Michigan Public Acts of 1921, as amended, petitioner has never requested from the respondent a redetermination of its franchise fees for the years in question. It did not furnish the information required under the statute with its annual reports for the years 1956, 1957, 1958 and 1959 (50a-53a). Further, petitioner has furnished no evidence to establish that the apportionment formula contained in 5e of Act No. 85 of the Michigan Public Acts of 1921, as amended,[3] attributes to the State of Michigan an unreasonable portion of petitioner's paid-up capital and surplus, assuming that the State of Michigan is permitted, as a matter of law, to measure a corporate privilege fee by the activity or business done within its territorial limits, irrespective of whether that business or activity is denoted intrastate, interstate, or foreign in character.

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[3] CLS § 450.305e; MSA § 21.298(3).

The State of Wisconsin does not levy an annual franchise fee upon corporations. Instead, it levies a tax upon net income derived from activities attributable to the State of Wisconsin. The Wisconsin statute provides for apportionment of income of a carrier by water engaging and qualified to engage in transportation both within and without Wisconsin. The apportionment is based upon the ratio of the number of miles traveled by a taxpayer's vessels in Wisconsin waters to the total number of miles traveled. Since, in the instant case, 45.88% of petitioner's water routes are in Wisconsin waters (81a), the State of Wisconsin deems 45.88% of the net income earned by petitioner to be attributable to Wisconsin.

By its own choice, petitioner has qualified itself to carry on business within the State of Michigan from 1951 to date; and for the years 1952 through 1954, petitioner voluntarily paid the amount of fees in accordance with the statute, but, while voluntarily keeping alive its qualifications to do business in this State as a foreign corporation for the years 1956 through 1959, petitioner paid only a fee of $10.00 plus $2.00 filing fee each year for this privilege. (9a)

ARGUMENT

1.

The commerce clause is not violated by the inclusion in the Michigan portion of the apportionment formula, for the purpose of measuring the appellant's annual privilege fee, of cargoes and passengers loaded and unloaded in Michigan ports, irrespective of whether this activity is connected with "intrastate" or "interstate" transportation.

Petitioner's argument to the contrary notwithstanding,

examination of the briefs filed in the Court below indicates that the only substantive issue sought to be raised by the petitioner is the ability of the State of Michigan to include within a corporate privilege tax **measure** a reasonable portion of petitioner's paid-up capital and surplus attributable to its total business done within this state, whether characterized as interstate, foreign or intrastate in nature.

Petitioner would raise here for the first time, questions concerning the reasonableness of that portion of its paid-up capital and surplus attributable to Michigan being used as a measure of its total business done within the state and the jurisdiction of the State of Michigan to impose the privilege tax in question because it alleges its activities are wholly interstate.

On page 11 of its brief before the Court below, the petitioner asserts that

> **"The controversy between appellant and the Commission arises over the manner in which the 'annual privilege fee' (franchise fee) due the State of Michigan for the years in question shall be computed. • • •"** (Emphasis supplied)

By reliance upon *Gartland Steamship Co.* v. *Corporation & Securities Commission*, 339 Mich 661, the petitioner takes the position that, as a matter of law, it is entitled to exclude from the in-Michigan portion of the Section 5c apportionment formula its total loadings and or unloadings in Michigan, which represent cargo or passengers either originating from sources without this State or having a destination without the State. Petitioner concludes that all its loadings and unloadings are of this nature and, therefore, the exclusion of this so-called "interstate commerce" business

in the Section 5c formula would result in a zero tax being due.[4]

Petitioner did not contend that the Section 5c formula, as applied to it, allocates or apportions to Michigan an unreasonable portion of its total business done or activities carried on within this state. Rather, petitioner contended that the State of Michigan cannot measure the corporate privilege fee by reference to the activities done or capital used in this state in furtherance of petitioner's "interstate business".

Further, petitioner did not rely upon any facts peculiar to it that would make the Section 5c formula unreasonable as applied to it, as compared to other carriers. It based its argument on the proposition that the formula is invalid as applied to all carriers. Petitioner has made no application for adjustment of its fees pursuant to Section 5e.

Petitioner's position in this cause is reasonably stated on page 22 of its brief in the Court below, as follows:

> "• • • as computed, the franchise tax is not related to appellant's taxable activities within the State for there were none. • • •"

And at page 23:

> "• • • The inclusion, therefore, of tonnages which are without question interstate in nature clearly renders

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[4] Nevertheless, the petitioner assumes that it is to pay a $10 fee (17). (If this flat rate minimum were $1,000 or $10,000, would petitioner still assume it should pay that amount?)

the application of the formula arbitrary and unreasonable, if not unconstitutional."

Thus, the only substantial federal question sought to be raised by the petitioner has been unequivocally answered by this Court on several occasions where it has expressly held that a local privilege tax could be measured by the total business done within the taxing jurisdiction irrespective of whether the activity is related to intrastate, interstate or foreign business.

U. S. Glue Co. v. *Oak Creek*, 247 US 321, held that a state could impose its general income tax on net income derived from transactions in interstate commerce without contravening the commerce clause.

Atlantic & Pacific Telegraph Co. v. *Philadelphia*, 190 US 160, 163, held that

"• • • the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to state taxation. • • •"

In the same vein, it was stated in *Hump Hairpin Co.* v. *Emmerson*, 258 US 290, 294, that

"• • • taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund • • • to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. • • •" (Emphasis supplied)

This principle was stated thusly in *International Shoe Co.* v. *Sharfel*, 279 US 429, 433:

> "• • • A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause **merely because a part of the property or capital included in computing the tax is used by it in interstate commerce**. (Cases cited)" (Emphasis supplied)

To the same effect are *Western Cartridge Co.* v. *Emmerson*, 281 US 511; *Matson Navigation Co.* v. *State Board*, 297 US 441; *Western Live Stock* v. *Bureau*, 303 US 250, 58 S Ct 546; *International Harvester Co.* v. *Evatt*, 329 US 416; and *Baltic Mining Co.* v. *Massachusetts*, 231 US 68, 82, 83, 87.

The principle that disposes of the petitioner's argument has been more recently stated by this Court in *Spector Motor Service, Inc.* v. *O'Connor*, 340 US 602, 609-610, as follows:

> "• • • where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, **may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate.** • • •" (Emphasis supplied)

No authorities have been found to the contrary, and none have been cited for the contrary proposition by the petitioner.

Petitioner is relying upon the Michigan cases of *Gartland Steamship Co.* v. *Corporation & Securities Commission*, *supra*, 339 Mich 661, and *Panhandle Eastern Pipe Line Co.* v. *Corporation & Securities Commission*, 346 Mich 50, and those decisions of this Court that preclude a state from imposing a tax on the privilege of engaging in interstate commerce, to establish the proposition that the Michigan Supreme Court's decision violated the commerce clause. In relying on the *Gartland* and *Panhandle* cases, petitioner forgets that they were overruled on the principle upon which it is relying.

In citing the decisions that preclude state taxation of the privilege of engaging in interstate commerce, petitioner forgets that the Corporation Tax Appeal Board found that petitioner was doing a local business within this state; that such consideration is immaterial since the privilege to do an intrastate business was granted petitioner at its own request; and that it limited its complaint in this cause to the reasonableness of the measure of the privilege of doing an intrastate business in Michigan.

It is thus apparent that the federal question relied upon by the petitioner results from a distortion of the facts and circumstances of this cause and reliance upon decisions that are either immaterial, such as those concerning a state's power to tax the privilege of engaging in interstate commerce, or are not controlling, such as the Michigan decisions of *Gartland*, *supra*, 339 Mich 661, and *Panhandle*, *supra*, 346 Mich 50, that have been overruled for purposes material here by the Supreme Court of Michigan in the cases of *Cleveland-Cliffs Iron Company* v. *Corporation and Securities Commission*, 351 Mich 652; *Duluth, South Shore & Atlantic Railroad Co.* v. *Corporation & Securities Commission*, *supra*, 353 Mich 636; and *Wisconsin & Michigan*

Steamship Co. v. *Corporation & Securities Commission*, *supra*, 371 Mich 61.[15]

2.

Petitioner has not properly raised any federal question.

As above indicated, the sole question at issue is the reasonableness of the measure of the fee for petitioner's **privilege** of carrying on or being able to carry on intrastate business activity in Michigan for the years in question. Yet, as above indicated, petitioner attempts to make out a substantial federal question for review by this Court by asserting that the fee is unreasonable as related to its **business done** within the State of Michigan. However, it has not raised as a factual question the reasonableness of its fee in the proceedings before the respondent Commission, before the Michigan Corporation Tax Appeal Board, or before the Michigan Supreme Court. It chooses, however, on the basis of the *Gartland* and *Panhandle* decisions of the Supreme Court of Michigan, *supra*, to assert as a matter of law that capital or income related to its interstate activities within Michigan cannot be included as a

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[15]

The Court below quoted *Duluth, South Shore & Atlantic Railroad Co.* v. *Corporation & Securities Commission*, *supra*, 353 Mich 636, as follows in footnote 7 to its opinion (36):

"'Both *Gartland* and *Panhandle* opinions, however, relied upon *Cooney* v. *Mountain State T. & T. Co.*, 294 US 384 (55 S Ct. 477, 79 L ed 934), for constitutional authority. Both failed to distinguish between the direct taxation of *interstate* commerce (which *Cooney* ruled out) and the employment of an interstate-commerce factor in the formula for determining the amount of paid up capital and surplus to be allocated to Michigan in computing the fee to be assessed for doing intrastate business in Michigan.' 353 Mich. 636, at p. 665."

part of the measure of the Michigan corporate tax imposed on the privilege of doing or being able to do an intrastate business.

Without the existence of this factual question — that is the reasonableness of the fee as related to the business done in Michigan by petitioner — petitioner has not brought itself within the purview of the apportionment decisions.

3.

The judgment of the Michigan Supreme Court is conclusive.

This Court has held on numerous occasions that it will not disturb findings or conclusions of fact of state Supreme Courts if supported by competent evidence; nor will it change the construction or operative effect given state taxing statutes if supported by the statutory language.

In the instant case, the Supreme Court of Michigan specifically found that the privilege tax in question was imposed on the privilege of doing or being able to do business in Michigan in a corporate capacity and, as applied to the petitioner, was not imposed on the exercise of the privilege of engaging in interstate commerce in Michigan. Furthermore, as a matter of fact, the Court below found that the petitioner, by voluntary application, was in position to exercise its intrastate business privileges in Michigan for the period covered by the fees in question.

The lower Court also found that the apportionment formula reasonably apportioned petitioner's paid-up capital and surplus to Michigan.

This construction of the Michigan law and findings of fact by the Court below make its opinion conclusive.

CONCLUSION

The petitioner premises its right to a review by this Court on the following proposition;

> "• • • it is petitioner's position that the state, through its legislative agency, respondent here, is prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the formula used to measure a corporate privilege fee for a foreign corporation who has qualified to do business within a state. • • •" (19)

As above indicated, this Court has unequivocally held on numerous occasions that receipts or income derived from, or property used in, interstate commerce may be included in the measure of a state corporate privilege fee.

It is crystal clear that petitioner does not seek to have this Court review any federal question that it has not already conclusively disposed of in numerous prior decisions and, therefore, petitioner's appeal is without merit.

Furthermore, the Supreme Court of Michigan's construction of a Michigan privilege fee imposed by Act 85 of the Michigan Public Acts of 1921, as amended, and its findings concerning the relationship of petitioner's activities in Michigan as pertains to that fee leave petitioner's argument completely unsupportable.

RELIEF

It is therefore respectfully requested that this Honorable Court deny the petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

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